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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 KENNETH R. BURNETT,

14 Defendant.

CASE NO. CR17-0029JLR

ORDER DENYING
DEFENDANT’S MOTION TO
REDUCE SENTENCE
PURSUANT TO 18 U.S.C.
§ 3582(C)(1)(A)(I)

15 **I. INTRODUCTION**

16 Before the court is Defendant Kenneth R. Burnett’s motion to reduce sentence
17 pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). (Mot. (Dkt. # 46); Reply (Dkt. # 61).) Plaintiff
18 the United States of America (the “Government”) opposes the motion. (Resp. (Dkt.
19 # 56).) The court has considered the parties’ submissions, the balance of the record, and
20 the applicable law. Being fully advised, the court DENIES Mr. Burnett’s motion.

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II. BACKGROUND

Mr. Burnett is a 50-year-old inmate who is currently detained at Federal Correctional Institution-Phoenix (“FCI-Phoenix”). (*See* Resp. at 4; Mot., Ex. 2 (Dkt. # 48 (sealed)) (“Medical Records”) at 1.) On January 3, 2017, two individuals working undercover with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”)—a confidential informant (“CI”) and an ATF agent—met Mr. Burnett at his residence to acquire a firearm. (Presentence Investigation Report (“PSR”) (Dkt. # 28 (sealed)) at 3-4.) Mr. Burnett showed them a loaded 12-gauge shotgun, a Norinco SKS rifle, and a Star Firestar 9-millimeter pistol. (*Id.* at 4.) At the same time, the CI discussed purchasing a half-ounce of heroin from Mr. Burnett. (*Id.*) After Mr. Burnett agreed to sell the CI a half-ounce of heroin, the CI paid Mr. Burnett and then returned later that day—again with the undercover agent—to pick up the heroin. (*Id.*) Approximately a week later, the ATF executed a search warrant on Mr. Burnett’s property and arrested Mr. Burnett. (*Id.*) During his arrest, ATF agents seized 15.6 grams of methamphetamine, 0.8 grams of heroin, a Norinco SKS rifle, a Star Firestar 9-millimeter pistol, 200 bullets, and two digital scales. (*Id.*) Mr. Burnett was indicted on one count of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B); one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c); and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (*See generally* Indictment (Dkt. # 11).)

On April 20, 2017, the parties entered into a plea agreement. (*See generally* Plea Agreement (Dkt. # 24).) As part of the plea agreement, the Government agreed not to

1 prosecute the possession of a firearm in furtherance of a drug trafficking crime charge.
2 (*See generally* Superseding Information (Dkt. # 20); Resp. at 3-4; Plea Agreement.)
3 Accordingly, Mr. Burnett pleaded guilty to one count of possession of methamphetamine
4 with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and one
5 count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (*See* Plea
6 Agreement ¶ 2.) Pursuant to the terms of the plea agreement, the Government agreed to
7 recommend no more than 15 years of incarceration, and Mr. Burnett agreed to
8 recommend no less than 10. (*See id.* ¶ 14.)

9 The U.S. Probation Office found Mr. Burnett's total offense level to be 25 based
10 on several factors, including: a base offense level of 24; a two-level upward deviation for
11 the possession of three firearms; a two-level upward deviation for maintaining premises
12 for the purpose of manufacturing or distributing a controlled substance; and a three-level
13 downward deviation for acceptance of responsibility. (*See* PSR at 6.) It further found
14 Mr. Burnett's criminal history category to be III based on his: (1) 2002 conviction for
15 carrying and possessing a firearm in furtherance of a drug trafficking crime; and (2) 2013
16 conviction for possession of heroin. (*See id.* at 7-10.) Thus, it calculated Mr. Burnett's
17 sentencing guidelines range as 70-87 months. (*See id.* at 13.)

18 In its presentence report, the U.S. Probation Office also acknowledged the
19 significant benefits that Mr. Burnett received through the Government's "exercise of
20 charging discretion" in the plea agreement. (*Id.* at 14.) It noted that had Mr. Burnett
21 been convicted of the § 924(c) count (possession of firearm in furtherance of drug
22 trafficking) that the Government agreed to dismiss, "it would be his second [§ 924(c)]

conviction and, thus, the mandatory minimum prison sentence would have been 25 years, which would have been required to run consecutively to the drug offense charged in [Count 1] (a five-year mandatory minimum sentence offense).” (*Id.*) Thus, “Mr. Burnett, by virtue of the plea agreement, . . . avoided a 30-year mandatory minimum sentence (or more had an additional § 924(c) count been charged as it could have been).” (*Id.*)

On September 5, 2017, the court sentenced Mr. Burnett to 10 years of imprisonment and five years of supervised release.¹ (Judgment (Dkt. # 40); 9/5/17 Min. Entry (Dkt. # 39).) Mr. Burnett did not appeal. (*See generally* Dkt.) He was remanded into custody following his sentencing hearing, and his projected release date is October 22, 2025. (*See* Judgment at 2; CR Memo. (Dkt. # 54 (sealed)) at 1; Resp. at 4.)

Mr. Burnett now seeks a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A),² asking the court to “reduce his sentence to a period of time within his current [United States Sentencing Guidelines (“U.S.S.G.”)] range of 63 to 78 months.”³ (*See generally* Mot. at 2.)

¹ Consistent with the plea agreement, the Government recommended a sentence of 15 years and Mr. Burnett recommended a sentence of 10 years at the sentencing hearing. (*See generally* Plea Agreement; Sentencing Tr. (Dkt. # 45).) Additionally, the court adopted the U.S. Probation Office’s sentencing guidelines calculation, finding that Mr. Burnett’s total offense level was 25 and that he was in criminal history category III, resulting in guidelines range of 70-87 months. (Sentencing Tr. at 26:18-20.)

² Mr. Burnett simultaneously filed a 28 U.S.C. § 2255 motion. *See* 2255 Mot., *Burnett v. United States*, No. C22-0361JLR (W.D. Wash. Mar. 25, 2022), Dkt. 1

³ To date, Mr. Burnett has served approximately 65 months in prison. (Mot. at 5 (stating that “Mr. Burnett has served five years in prison as of January 11, 2022”).) Thus, reducing his sentence to 65 months or less would be equivalent to reducing his sentence to time served.

III. ANALYSIS

The court begins by setting forth the standard of review before turning to its analysis of Mr. Burnett's motion.

A. Standard for a Reduction in Sentence

A court generally may not correct or modify a prison sentence once it has been imposed, unless permitted by statute or by Federal Rule of Criminal Procedure 35. *United States v. Penna*, 315 F.3d 509, 511 (9th Cir. 2003); *see also Dillon v. United States*, 506 U.S. 817, 824-25 (2010). 18 U.S.C. § 3582(c)(1), as amended by the First Step Act of 2018, "allows certain inmates to seek a form of sentence modification," commonly referred to as compassionate release,⁴ "by filing motions to that effect with the district court." *See United States v. King*, 24 F.4th 1226, 1228 (9th Cir. 2022); *Riley v. United States*, No. C19-1522JLR, 2020 WL 1819838, at *5 (W.D. Wash. Apr. 10, 2020). Under § 3582(c)(1), courts have the authority to reduce a sentence upon the motion of an inmate if three conditions are met: (1) the inmate has either exhausted their administrative appeal rights of the Bureau of Prisons' ("BOP") failure to bring such a motion on the inmate's behalf or has waited until 30 days after the applicable warden has received such a request; (2) the inmate has established "extraordinary and compelling reasons" for the requested sentence reduction; and (3) the reduction is consistent with

⁴ "Although relief under § 3582(c) is commonly referred to as 'compassionate release,' such relief is not limited to immediate release, but includes a reduction in sentence." *United States v. Millard*, No. CR-15-01391-PHX-DGC, 2022 WL 279596, at *2 n.1 (D. Ariz. Jan. 31, 2022) (quoting *United States v. Marks*, No. 03-cr-06033-L, 2020 WL 1908911, at *3 n.3 (W.D.N.Y. Apr. 20, 2020)).

1 “applicable policy statements” issued by the United States Sentencing Commission. *See*
 2 18 U.S.C. § 3582(c)(1)(A)(i); *see also Riley*, 2020 WL 1819838, at *5. It also instructs
 3 the court to consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when
 4 deciding whether a reduction in sentence is appropriate. 18 U.S.C. § 3582(c)(1)(A).

5 The Sentencing Commission’s policy statement referenced in 18 U.S.C.
 6 § 3582(c)(1)(A)(i) provides, in relevant part, that a defendant may be eligible for
 7 compassionate release if “extraordinary and compelling reasons warrant the reduction”;
 8 the “defendant is not a danger to the safety of any other person or to the community”; and
 9 the “reduction is consistent with this policy statement.” U.S.S.G. § 1B1.13; *id.* cmt. n.1
 10 (outlining four categories of circumstances that may constitute “extraordinary and
 11 compelling reasons” for a sentence reduction).

12 The Ninth Circuit, however, has held that U.S.S.G. § 1B1.13 “is not an ‘applicable
 13 policy statement’ for 18 U.S.C. § 3582(c)(1)(A) motions filed by a defendant.” *United*
 14 *States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021). Therefore, the “Sentencing
 15 Commission’s statements in U.S.S.G. § 1B1.13 may inform a district court’s discretion
 16 for § 3582(c)(1)(A) motions filed by a defendant, but they are not binding.” *Id.*; *see also*
 17 *United States v. Van Cleave*, No. CR03-0247RSL, 2020 WL 2800769, at *5 (W.D. Wash.
 18 May 29, 2020) (referring to the policy statement as “persuasive, but not binding”).

19 **B. Exhaustion of Administrative Remedies**

20 Before considering the merits of Mr. Burnett’s motion, the court must determine
 21 whether he has met the statutory exhaustion requirement for a reduction in sentence. *See*
 22 18 U.S.C. § 3582(c)(1)(A). Mr. Burnett, through his counsel, made a request for a

1 reduction in sentence to the warden at FCI-Phoenix on November 18, 2021, which was
 2 denied on December 14, 2021. (*See* Mot. at 2, Exs. 1A-1B.) Mr. Burnett then filed this
 3 motion in March 2022—more than 30 days after he submitted his request to the warden.
 4 (*See generally* Mot.) The court finds that the statutorily required 30-day period has
 5 expired, and Mr. Burnett’s motion is properly before the court.⁵

6 **C. Extraordinary and Compelling Circumstances**

7 The court must next determine whether “extraordinary and compelling”
 8 circumstances warrant a reduction of Mr. Burnett’s term of imprisonment. *See* 18 U.S.C.
 9 § 3582(c)(1)(A)(i). Mr. Burnett bears the burden of establishing that “extraordinary and
 10 compelling reasons” exist that justify a reduction in sentence. *See United States v.*
 11 *Suryan*, No. CR19-0082RAJ, 2021 WL 3510423, at *2 (W.D. Wash. Aug. 10, 2021).
 12 Mr. Burnett argues that he is entitled to a reduction in sentence because: (1) his age and
 13 weight make him “vulnerable to COVID-19 complications” and his hypothyroidism⁶ is
 14 being inadequately treated by the BOP; (2) had he been charged after the “First Step Act,
 15 [he] would not face ‘stacked’ sentences resulting from multiple Section 924(c)
 16 convictions”; (3) since being sentenced, his advisory guidelines range has gone down
 17 because his criminal history category went down by one level after his 2013 state

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 19 ⁵ The Government agrees that Mr. Burnett complied with § 3582(c)(1)(A)’s exhaustion
 20 requirement. (*See* Resp. at 6.)

21 ⁶ In Mr. Burnett’s motion, he claims that he suffers from hyperthyroidism. (*See* Mot. at
 22 4.) However, his medical records establish that he has been diagnosed with hypothyroidism, a
 different condition. (*See* Medical Records at 1, 24; *see also* Resp. at 12 n.18.) Accordingly, the
 court refers to his condition as hypothyroidism rather than hyperthyroidism throughout this
 order.

conviction for possession of heroin was vacated; and (4) “the pandemic has created harsher prison conditions than what [he] would have otherwise experienced during pre-pandemic times.” (*See generally* Mot. at 7-10.) The court addresses each argument individually before addressing whether Mr. Burnett’s arguments, taken together, present extraordinary and compelling reasons warranting a sentence reduction.

1. COVID-19 Vulnerability and Management of Medical Condition

Mr. Burnett argues that his medical conditions amount to “extraordinary and compelling reasons” warranting his release. (*See* Mot. at 7-8; Reply at 3-4.) Specifically, he argues that: (1) his age and weight make him more susceptible to suffering severe complications from COVID-19; and (2) the BOP is inadequately treating his hypothyroidism. (*See* Mot. at 7-8; Reply at 3-4.) The court addresses each argument in turn.

A review of Mr. Burnett’s medical records reveals that he has a body mass index (“BMI”) of 28.2, which is considered overweight. (*See* Medical Records at 118 (providing Mr. Burnett’s weight as of April 2021); PSR at 12 (listing Mr. Burnett’s height as 6’2”)); *see also United States v. Slaughter*, No. CR13-0359RSL, 2021 WL 2400866, at *2 (W.D. Wash. June 11, 2021) (citing *Adult BMI Calculator*, CDC, https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html (last visited June 30, 2022) (calculating a person’s BMI using their height and weight)). The CDC has recognized that individuals who are overweight or obese may be more likely to get severely ill from COVID-19. *See United States v. Rollness*, No. CR06-0041RSL, 2021 WL 4476920, at *5 (W.D. Wash. Sept. 30, 2021)

(citing *People with Certain Medical Conditions*, CDC (May 2, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (defining overweight as a BMI between 25 and 30 and stating that the “risk of severe illness from COVID-19 increases sharply with higher BMI”)). Mr. Burnett’s medical records also indicate that he is 50. (*See* Medical Records at 1.) The CDC “recognizes that the risk of severe illness from COVID-19 increases with age but makes clear that people in their 50s have a lower risk for severe infection than individuals in their 60s, 70s, or 80s.” *See United States v. Meza-Orozco*, No. CR14-5246BHS, 2021 WL 3630519, at *3 & n.3 (W.D. Wash. Aug. 17, 2021) (citing *Older Adults*, CDC (Aug. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (“People 85 or older are the most likely to get very sick.”)).

Although Mr. Burnett establishes that he may be more likely to suffer severe complications from COVID-19 due to his age and weight, that risk is significantly lessened by that fact that Mr. Burnett has received two doses of the Moderna COVID-19 vaccine. (*See* Medical Records at 31); *see also United States v. Grummer*, 519 F. Supp. 3d 760, 763 (S.D. Cal. 2021) (collecting cases concluding that the risks posed by COVID-19 are lessened through vaccination). While no vaccine is 100% effective, studies from the Centers for Disease Control and Prevention indicate that Mr. Burnett’s risk of infection is low given his vaccination status and, furthermore, that vaccination

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reduces his risk of severe illness if he were to become infected.⁷ *See United States v. Posey*, No. CR18-0280RSL, 2021 WL 4745523, at *5-6 (W.D. Wash. Oct. 12, 2021) (citing *Benefits of Getting Vaccinated*, CDC (June 19, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html>); *Meza-Orozco*, 2021 WL 3630519, at *4 (“[A]ll vaccines are effective against severe illness, hospitalization, and death.” (citing *What You Need to Know about Variants*, CDC (Apr. 26, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html>)). Accordingly, although Mr. Burnett’s slightly elevated BMI and age increase his risk of developing severe complications from COVID-19, the court concludes that this risk is significantly lessened because of Mr. Burnett’s vaccination status and thus does not amount to an extraordinary and compelling reason to reduce his sentence. *See, e.g., United States v. Stringer*, No. CR18-0157RAJ, 2021 WL 3565430, at *3 (W.D. Wash. Aug. 12, 2021) (“While no vaccine is 100% effective, it substantially reduces the likelihood of Mr. Stringer contracting the virus” and protects against the risk of “developing severe complications . . . should he become infected,” even in light of his diabetes and

⁷ *See, e.g., United States v. Bolden*, No. CR13-0201RSM, 2021 WL 3269636, at *4-6 n.1 (W.D. Wash. July 30, 2021) (first citing *COVID-19 Vaccines Work*, CDC (June 28, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html>; then citing *Reinfection with COVID-19*, CDC (Jan. 20, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html>; and then citing *The Possibility of COVID-19 after Vaccination: Breakthrough Infections*, CDC (June 23, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html>); *United States v. Meyer*, No. 1:14-CR-00148-01-MC, 2021 WL 1895240, at *2 (D. Or. May 11, 2021) (“The [Moderna] vaccine appeared to have high effectiveness in clinical trials (efficacy) among people of diverse age, sex, race, and ethnicity categories and *among persons with underlying medical conditions*.” (emphasis in original) (citing *Moderna*, CDC (June 24, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Moderna.html>)).

1 hypertension.); *Grummer*, 519 F. Supp. 3d at 763 (finding that the defendant did not
2 demonstrate extraordinary and compelling reasons for release because, while he was at
3 risk for developing severe complication from COVID-19 due to his age and several
4 chronic medical conditions, “his vaccination significantly mitigates the risk that he will
5 contract COVID-19”).

6 Additionally, although Mr. Burnett’s medical records also confirm that he suffers
7 from hypothyroidism (*see* Medical Records at 1, 24), the CDC has not defined
8 hypothyroidism as a condition that makes an individual more likely to get severely ill
9 from COVID-19. *See People with Certain Medical Conditions, supra*; *see also United*
10 *States v. Leonard*, No. CR1508076004PCTDGC, 2021 WL 5177862, at *3 (D. Ariz.
11 Nov. 5, 2021). As such, Mr. Burnett instead contends that the BOP’s inadequate
12 treatment of his hypothyroidism amounts to an extraordinary and compelling reason for a
13 reduction in sentence. (*See* Mot. at 4, 7; Reply at 3-4 (discussing Mr. Burnett’s high
14 thyroid stimulating hormone (“TSH”) levels and alleging that he has a high heart rate and
15 heart palpitations when on his hypothyroidism medication).) However, “[c]hronic but
16 manageable medical conditions alone do not constitute extraordinary and compelling
17 circumstances.” *United States v. Miller*, No. 15-CR-00471-CRB-1, 2021 WL 2711728,
18 at *4 (N.D. Cal. July 1, 2021); *United States v. Lii*, No. CR 07-00423 HG-01, 2021 WL
19 5828370, at *4 (D. Haw. Dec. 8, 2021). Mr. Burnett’s medical records do not
20 demonstrate that the BOP is unable to manage or has refused to treat Mr. Burnett’s
21 hypothyroidism in a way that is extraordinary and compelling. Rather, his medical
22 records demonstrate that: (1) Mr. Burnett is prescribed medication for his

1 | hypothyroidism and regularly undergoes testing regarding his condition; (2) Mr. Burnett
2 | has on numerous occasions informed the BOP that his hypothyroidism medication is
3 | making his heart rate increase and has stopped taking the medication; and (3) each time
4 | Mr. Burnett complains or stops taking his medication, the BOP meets with Mr. Burnett,
5 | orders testing if necessary, and changes Mr. Burnett's dosage. (*See, e.g.,* Medical
6 | Records at 32-33, 1-18 (noting that the BOP has also taken steps to ensure that Mr.
7 | Burnett complies with taking his hypothyroidism medication).)

8 | While the court is sympathetic to Mr. Burnett's medical issues and concerns and
9 | acknowledges that his medical records reflect high TSH levels, this case is not analogous
10 | to those in which the defendant's medical conditions, "by their nature, cannot be treated
11 | effectively in prisons," *Miller*, 2021 WL 2711728, at *4, or where the BOP has refused to
12 | treat the defendant's medical conditions. *See, e.g., United States v. Rodriguez*, 424 F.
13 | Supp. 3d 674, 682 (N.D. Cal. 2019) (collecting cases regarding conditions that cannot be
14 | treated effectively in prison); *United States v. Bisel*, No. 10CR5016-H, 2021 WL
15 | 3634830, at *4 (S.D. Cal. Aug. 16, 2021); *United States v. Waxman*, No.
16 | CR18-0175RSL, 2021 WL 4148180, at *6 (W.D. Wash. Sept. 13, 2021). Moreover, the
17 | court notes that Mr. Burnett has alternative legal avenues for redressing constitutionally
18 | inadequate medical care. *See Miller*, 2021 WL 2711728, at *4 (stating that "[p]risoners
19 | routinely bring constitutional claims based on inadequate medical care" under the Eighth
20 | Amendment). Accordingly, the court concludes that Mr. Burnett has not established that
21 | the BOP's treatment of his hypothyroidism is an extraordinary and compelling
22 | circumstance warranting a reduction in sentence.

1 In sum, the court concludes that Mr. Burnett’s risk of developing severe
 2 complications from COVID-19 and the BOP’s treatment of his hypothyroidism, when
 3 considered individually or together, do not amount to extraordinary and compelling
 4 reasons justifying a sentence reduction.

5 2. First Step Act and Stacked Sentences

6 Mr. Burnett contends that Congress’s modification of the operation of the
 7 “stacking” provisions of 18 U.S.C. § 924(c), a “benefit” that he did not have when
 8 negotiating with the Government, warrants a sentence reduction. (Mot. at 8.) He claims
 9 that, had he been charged today, “there is no possibility that he would or could face a
 10 mandatory minimum of 55 years as the government threatened back in 2017”⁸ because
 11 “Section 403 of the First Step Act did away with the ‘stacking’ of § 924(c) penalties
 12 resulting from multiple § 924(c) counts charged in the same indictment.” (*Id.*) The
 13 Government argues that: (1) Mr. Burnett misunderstands the change to the “stacking”
 14 provisions, and that the changes would not have impacted the possible sentence that he
 15 faced; and (2) even if the change to the “stacking” provisions would have lessened the
 16 potential sentence that Mr. Burnett faced, such a change does not warrant a sentence
 17 reduction. (Resp. at 13-15.)

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 19 ⁸ Mr. Burnett’s reference to a 55-year mandatory minimum sentence is based on: (1) the
 20 five-year mandatory minimum that he faced for the drug offense charged in Count 1 of the
 21 indictment; (2) the 25-year mandatory minimum that he faced for the § 924(c) offense charged in
 22 Count 2 of the indictment, which would have been required to run consecutively to the Count 1
 offense; and (3) the 25-year mandatory minimum that he would have faced for an additional
 § 924(c) offense that “could have been” charged, which would have been required to run
 consecutively to the Count 1 and Count 2 offenses. (*See generally* PSR at 13-14; Indictment;
 Resp. at 15-16.)

At the time Mr. Burnett was sentenced, 18 U.S.C. § 924(c)⁹ established a mandatory minimum of at least five years¹⁰ of imprisonment for a defendant's first § 924(c) conviction, as well as longer mandatory minimum penalties, generally requiring 25 years of imprisonment, for each "second or subsequent [§ 924(c)] conviction." 18 U.S.C. § 924(c)(1) (2006). The Supreme Court interpreted the phrase "second or subsequent conviction" to mean that prosecutors could "stack" multiple counts of § 924(c) violations, which resulted in defendants without previous § 924(c) convictions being charged for both a first offense—carrying a 5-year mandatory minimum, to be served consecutively—and a "second or subsequent offense"—carrying a mandatory 25-year sentence, to be served consecutively—in the same indictment. *See United States v. Jones*, 482 F. Supp. 3d 969, 978 (N.D. Cal. 2020) (citing *Deal v. United States*, 508 U.S. 129, 131-32 (1993) (stating that any additional convictions of an offense under § 924(c), whether they occur in the same proceeding as the first conviction or not, are "second or subsequent" to the first such conviction), *superseded by statute*, First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194 (Dec. 21, 2018)). As such, someone convicted of two § 924(c) counts in a single proceeding automatically faced a "stacked" mandatory minimum sentence of 30 years. *Id.*

⁹ 18 U.S.C. § 924(c) establishes the offense of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or a drug trafficking crime.

¹⁰ The statute provides for increasingly longer mandatory minimum penalties for a defendant's first § 924(c) conviction based on how the firearm was used and the type of firearm involved. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A)(ii)-(iii).

As part of the First Step Act, Congress eliminated, as to first time offenders, the 25-year mandatory minimum “stacking” for multiple § 924(c) offenses within in the same indictment.¹¹ *See United States v. Voris*, 964 F.3d 864, 873-74 & n.9 (9th Cir. 2020) (examining pre- and post-First Step Act mandatory minimum sentences for five § 924(c) convictions); *see also United States v. Wells*, No. 214CR00280JCMGWF, 2022 WL 1720987, at *2 (D. Nev. May 27, 2022) (same). In the Act, Congress amended the text § 924(c)’s stacking provision by striking the language “second or subsequent conviction under this subsection” and substituting in “violation of this subsection that occurs after a prior conviction under this subsection has become final.” First Step Act § 403(a); *see also id.* § 403(b) (declining to make the amendment retroactive). Thus, after the First Step Act, if a defendant is convicted of his first and second § 924(c) offense in the same proceeding, the mandatory minimum would be five years on each of those counts, to be served consecutively, for a total of ten years.¹² *Id.* § 403(a); *Quinn*, 467 F. Supp. 3d at 827-28; 18 U.S.C. § 924(c)(1). However, if a repeat offender—that is, someone who carries out an additional § 924(c) offense after having already been convicted of one—is convicted of two § 924(c) offenses in the same proceeding, the mandatory minimum

¹¹ To be clear, the First Step Act did not completely do away with mandatory minimum “stacking” for first time offenders in the sense that the mandatory minimum for each § 924(c) conviction in the same proceeding must still be served consecutively. *See* 18 U.S.C. § 924(c)(1)(D)(ii).

¹² Before the First Step Act, this defendant would have faced a total of 30 years: 5 years for the first § 924(c) conviction and 25 years for the second § 924(c) conviction, to be served consecutively. *See, e.g., United States v. Quinn*, 467 F. Supp. 3d 824, 827-28 (N.D. Cal. 2020).

1 would still be 25 years on each of those additional § 924(c) convictions, to be served
2 consecutively, for a total of fifty years. First Step Act § 403(a); 18 U.S.C. § 924(c)(1).

3 Here, Mr. Burnett was first convicted of a § 924(c) violation (possession of
4 firearm in furtherance of drug trafficking) in 2002. *See* Judgment, *United States v.*
5 *Burnett*, No. CR02-0162RSL (W.D. Wash. Oct. 24, 2022), Dkt. 93. He was sentenced on
6 October 24, 2002, and never appealed or collaterally attacked the judgment, so Mr.
7 Burnett’s first § 924(c) conviction had been final for almost 15 years by the time he was
8 sentenced in this case. *See generally id.*; (Judgment). Thus, had Mr. Burnett been
9 convicted of the single count of possession of a firearm in furtherance of a drug
10 trafficking crime, as was originally charged, he would have faced a mandatory minimum
11 sentence of 25 years on that count because of his prior, final § 924(c) conviction—
12 regardless of whether he was sentenced before or after enactment of the First Step Act.
13 *See* First Step Act § 403(a); 18 U.S.C. § 924(c)(1). Similarly, regardless of when Mr.
14 Burnett was sentenced, if the Government had charged an additional § 924(c) count in
15 this case, and if Mr. Burnett had thus been convicted of two § 924(c) offenses, he would
16 have faced a mandatory minimum sentence of 50 years on those counts¹³—as each
17 additional § 924(c) conviction carries a 25-year mandatory minimum, to be served
18 consecutively. 18 U.S.C. § 924(c)(1). Accordingly, the changes to § 924(c)’s “stacking”
19 provision have no impact on the possible sentence that Mr. Burnett faced. For that
20

21 ¹³ In total, Mr. Burnett would have faced a 55-year mandatory minimum sentence
22 because of the 5-year mandatory minimum that Mr. Burnett faced for the drug offense charged in
Count 1 of the indictment. (*See generally* PSR at 13-14; Indictment.)

1 reason, the court finds that Congress’s amendment to § 924(c)’s “stacking” provision
 2 does not present an extraordinary and compelling basis for a reduction in sentence in this
 3 case.

4 3. Change in Criminal History Category Due to Change in Law

5 Mr. Burnett next claims that he is entitled to a sentence reduction because his
 6 federal sentencing guidelines calculation was based on a state conviction that has since
 7 been vacated on constitutional grounds. (Mot. at 8-9; *id.*, Ex. 5.) The vacatur and
 8 dismissal of his 2013 state conviction for possession of heroin, pursuant to the
 9 Washington State Supreme Court’s *State v. Blake*, 481 P.3d 521 (2021) decision,
 10 eliminates two of his five criminal history points, reducing his criminal history category
 11 from III to II and his advisory guidelines range from 70-87 months to 63-78 months. (*Id.*
 12 at 8-9.) The Government argues that this change in Mr. Burnett’s advisory guidelines
 13 range “is not an extraordinary and compelling reason to change [his] sentence” because:
 14 (1) “[c]ompassionate release is not a tool to correct a judgment” (Resp. at 16 (quoting
 15 *United States v. Crawford*, No. CR16-5303RBL, 2020 WL 47912645, at *3 (W.D. Wash.
 16 Aug. 18, 2020))); and (2) Mr. Burnett’s sentence was based on the plea agreement that he
 17 “voluntarily entered to avoid risking a 55-year mandatory minimum sentence” rather than
 18 the applicable guidelines range (*id.* (“[Mr. Burnett] worked out a plea deal to avoid a
 19 55-year sentence by agreeing to a ten-year sentence. The court gave [him] exactly what
 20 he asked for.”)).

21 Mr. Burnett concedes in his reply brief that his “criminal history reduction is not,
 22 in itself, an extraordinary and compelling circumstance.” (Reply at 2-3.) The court

1 agrees. The court previously rejected Mr. Burnett's arguments on this point, which were
 2 raised as a habeas claim, and does not revisit them at this time. *See* 6/27/22 Order,
 3 *Burnett v. United States*, No. C22-0361JLR (W.D. Wash. June 27, 2022), Dkt. 12.¹⁴ The
 4 court, however, notes that its reasons for rejecting Mr. Burnett's arguments in the habeas
 5 context are equally applicable to its conclusion that the changes in his criminal history
 6 category and advisory guidelines range are not extraordinary and compelling
 7 circumstances justifying a sentence reduction.

8 4. Conditions of Confinement at FCI-Phoenix

9 Mr. Burnett argues that COVID-19's impact on his conditions of confinement
 10 warrants a reduction in sentence. (*See* Mot. at 9-10.) He contends that with the
 11 COVID-19 pandemic, "individuals have been forced to isolate or quarantine with their
 12 movement restricted" and have had their visitation privileges "restricted if not cancelled
 13 altogether." (*Id.* at 9 ("The nationwide BOP lockdowns over the past two years due to
 14 COVID have created a maximum security environment for practically every inmate
 15

16 ¹⁴ During sentencing, the court noted that Mr. Burnett's was "unusual" because the
 17 parties "agreed[, pursuant to the plea agreement,] to make recommendations to the court greater
 18 than [the applicable guidelines] range"—Mr. Burnett recommended 120 months and the
 19 Government recommended 180 months. (*See* Sentencing Tr. at 26:18-23, 3:7-9, 4:7-9, 13:19-24;
 20 *see also* Plea Agreement ¶ 14.) After evaluating the parties' recommendations in light of the 18
 21 U.S.C. § 3553(a) factors, the court ultimately concluded that the § 3553(a) factors supported Mr.
 22 Burnett's recommendation of 120 months—"a sentence which is sufficient but not greater than
 necessary" to achieve the goals of sentencing. (*See, e.g.,* Sentencing Tr. at 27:4-31:5.) Because
 the court chose to adopt Mr. Burnett's significantly above-guidelines recommendation in light of
 the § 3553(a) factors, the court concluded that there was no reasonable probability that it would
 have sentenced Mr. Burnett to less than 120 months had his advisory guidelines range been 7-9
 months shorter. 6/27/22 Order at 11-14, *Burnett*, No. C22-0361JLR. Accordingly, the court
 denied Mr. Burnett's habeas motion because he had not established actual prejudice to overcome
 his procedural default. *Id.* at 15.

1 regardless of classification.”).) The “constant lockdowns and other unusually severe
2 conditions,” he alleges, have made “the conditions of confinement much harsher” for him
3 and “could not have been foreseen” by this court during his sentencing. (*Id.* at 9-10.)

4 The court need not reiterate the widely known information regarding the
5 symptoms of COVID-19, the devastating global impact of the virus, and the
6 unprecedented challenges COVID-19 created for federal prisons. *See Rollness*, 2021 WL
7 4476920, at *4 (discussing COVID-19’s impact on prisons). Moreover, the court does
8 not discount the dangers associated with COVID-19 nor the difficulties prisons face in
9 preventing and containing outbreaks.

10 However, “general conditions that affect inmates indiscriminately throughout the
11 prison are insufficient to support an individual defendant’s claim for compassionate
12 release.” *United States v. Bolden*, No. CR16-0320RSM, 2020 WL 4286820, at *7 (W.D.
13 Wash. July 27, 2020); *United States v. Thomas*, No. 3:17-CR-00051-SLG, 2021 WL
14 3924724, at *2 (D. Alaska Sept. 1, 2021) (“[E]very BOP inmate—and in fact nearly
15 every incarcerated person—has experienced limitations on their ability to communicate,
16 exercise, gain an education, and receive job skills training during the COVID-19
17 pandemic. Conditions that are shared by nearly every inmate in the country are not
18 “extraordinary and compelling,” and the restrictions Mr. Thomas is subject to are in no
19 way unique to him.”). Courts have also rejected generalized claims “that [a defendant’s]
20 period of incarceration, served during the time of Bureau of Prisons’ COVID-19
21 restrictions, has presented harsher punishment and made this past year more difficult.”
22 *See Suryan*, 2021 WL 3510423, at *3 (stating that BOP lockdown “conditions, while

challenging, do not present an extraordinary and compelling reason to warrant his early release”); *United States v. Becerra*, Case No. 17cr1465-LAB, 2021 WL 461699, at *2 (S.D. Cal. Feb. 8, 2021) (“The inconvenience caused by extended lockdown is not an ‘extraordinary and compelling reason.’”). While Mr. Burnett’s conditions of confinement at FCI-Phoenix have been more challenging than the court could have predicted, this is a generalized claim that every inmate who has been in custody could assert and is not unique to Mr. Burnett. Accordingly, the court finds that Mr. Burnett’s conditions of confinement do not constitute “extraordinary and compelling” circumstances warranting a reduction in sentence. *See Suryan*, 2021 WL 3510423, at *3.

The court further finds that, even when Mr. Burnett’s arguments are considered together, he has not established “extraordinary and compelling” reasons justifying a reduction in sentence.¹⁵ Therefore, the court DENIES Mr. Burnett’s motion.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Mr. Burnett’s motion to reduce sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (Dkt. # 46).

Dated this 2nd day of July, 2022.



JAMES L. ROBART
United States District Judge

¹⁵ Having determined that Mr. Burnett has not made the requisite showing of extraordinary and compelling reasons warranting a reduction in sentence, the court need not analyze whether a reduction in Mr. Burnett’s sentence would be consistent with the factors set forth in 18 U.S.C. § 3553(a).